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No. 09-1327

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

MARK ANTHONY GILL,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri
– Capital Case –

REPLY BRIEF

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PETITIONER'S REPLY

Petitioner has asked the Court to consider the following question:

Does a defendant's constitutional right to effective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), require capital-defense counsel to conduct a pre-trial investigation into evidence that disparages the murder victim's character, even though such character evidence is presumptively inadmissible under state law?

In his Brief in Opposition ("Opp.Br."), respondent Mark Gill ("Gill") argues that victim-impact evidence is presumptively admissible, and thus it follows that capital-defense counsel is reasonably required to investigate facts to rebut the State's victim-impact evidence. Opp.Br. at 17-19, 21-22. From this premise, Gill maintains that his case "involves nothing more than a straightforward application of *Rompilla v. Beard*, 545 U.S. 374 (2005)." Opp.Br. at 22.

But Gill's analysis sidesteps the question presented by wrongly equating "victim-impact" evidence with "victim-character" evidence. It is true that some victim-impact evidence is admissible. But the question presented asks whether trial counsel is constitutionally obligated to investigate evidence about a victim's character—evidence that is presumptively inadmissible, even when presented as part of victim-impact testimony. Until the Missouri Supreme Court announced its opinion in the present case, no court had ever, to petitioner's knowledge, deemed trial counsel ineffective for failing to gather presumptively inadmissible evidence. Therefore, this case cannot be resolved with a straightforward

application of the Court's opinion in *Rompilla*. To the contrary, the Missouri Supreme Court's holding expands the scope of capital-defense counsel's investigative duties far beyond those mandated by *Rompilla*.

I. Gill's argument ignores the presumptive inadmissibility of victim-character evidence, and thereby unjustly condemns trial counsel for failing to prepare rebuttal for inadmissible evidence that was, in hindsight, improperly admitted over counsel's objection.

Gill argues that this case is not "cert-worthy" because the Missouri Supreme Court "simply applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984)" to a unique set of facts. Opp.Br. at 16. But, as Gill's analysis reveals, the Missouri Supreme Court did not follow *Strickland* in evaluating counsel's performance in this case because the Court improperly judged counsel's actions based on whether they appeared reasonable in hindsight, rather than on whether they were reasonable in light of counsel's perspective at the time. *See Strickland*, 466 U.S. at 689-90 (requiring that counsel's actions be "viewed as of the time of counsel's conduct").

The fundamental flaw in Gill's analysis is that it assumes, wrongly, that defense counsel could not have reasonably expected that they could prevent the State from eliciting evidence about the victim's good character at trial. And based on this assumption, Gill argues that competent counsel would have looked at the pornographic files on the victim's computer and interviewed Officer James about the computer's contents in an effort to develop evidence to rebut the

positive portrayal of the victim. Opp.Br. at 16-17, 22.

But before trial, defense counsel had no reason to expect that the State would be permitted to adduce inadmissible evidence of the victim's good character. Defense counsel had decided to object to such evidence, and their decision was objectively reasonable. As the Missouri Supreme Court recognized in the present case, "Generally, neither the State nor the defense may introduce character evidence about the victim in a murder case." *Gill v. State*, 300 S.W.3d 225, 232 (Mo. banc 2009) (citing *State v. Hall*, 982 S.W.2d 675, 681 (Mo. banc 1998)). Gill argues that *Hall* stands only for the proposition that "a defendant cannot initiate injecting evidence of the victim's bad character," Opp.Br. at 18, but this argument is refuted by both *Hall* and the Missouri Supreme Court's analysis in the present case:

> If the State attempts to introduce evidence of the good character of the victim in the penalty phase, defense counsel has two options. Defense counsel may object to the introduction of the character evidence. If defense counsel chooses this option, *the trial court should sustain the objection and disallow the character evidence*. Alternatively, defense counsel may, as a strategic maneuver, choose to allow the State to present the good character evidence of the victim. By doing so, the State opens the door for the defense to present rebuttal character evidence.

Gill, 300 S.W.3d at 232-33 (emphasis added). Thus, under Missouri law, the State may not introduce evidence about the victim's character in the penalty phase if the defendant objects to it.

Gill claims that counsel was ineffective for failing to investigate the negative victim-character evidence "in a case where victim was portrayed as a 'saint,'" and he argues that if counsel had uncovered the pornography on the victim's computer, they could have "used it to dissuade the state from misrepresenting [the victim] as a person of stellar character and morals . . . ." Opp.Br. at 16, 22. Alternatively, Gill argues, counsel could have used the material to rebut the State's victim-character evidence if the State "insisted on misrepresenting [the victim's] character." Opp.Br. at 16, 22. But Gill ignores the fact that counsel had no reason to believe that the State would be allowed to present positive victim-character evidence that would necessitate rebuttal. Counsel objected to the introduction of the State's character evidence and, thus, the trial court should have sustained the objection and kept all character evidence out. *Gill*, 300 S.W.3d at 233 n.8.

It is, of course, true that the trial court overruled counsel's objection. *Gill*, 300 S.W.3d at 233 n.8. But the trial court's mistaken ruling did not retroactively render counsel's preparation incompetent.[1] Viewed from counsel's perspective at the time they were preparing their case, it was reasonable not to spend time gathering victim-character evidence that they had every reason to believe would not be admissible.

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[1] On direct appeal, Gill challenged the trial court's admission of one of the statements that he now alleges portrayed the victim as a man of "stellar character." *State v. Gill*, 167 S.W.3d 184, 195-97 (Mo. banc 2005). The Missouri Supreme Court held that even if the statement was impermissible, it was not "so unduly prejudicial as to render the trial 'fundamentally unfair.'" *Id.* at 197.

Gill's perspective, like the Missouri Supreme Court's, is distorted by hindsight. At the time counsel decided not to investigate the contents of the victim's computer, they had no reason to believe that any material thereon would be admissible. The Court should grant certiorari to clarify that the Constitution does not require capital-defense counsel to expend scarce resources developing evidence that they have no reason to believe will be admissible at trial.

II. Gill's dismissal of the conflict between jurisdictions regarding counsel's obligation to gather inadmissible evidence relies on Gill's improper generalization of "victim-character" evidence as "victim-impact" evidence.

In responding to Petitioner's argument that the Missouri Supreme Court's opinion conflicts with decisions of the Montana Supreme Court and the Tenth Circuit regarding counsel's duty to discover inadmissible evidence, Gill states simply that, "This Court has made clear through its decisions that rebuttal to victim-impact evidence is presumptively admissible." Opp.Br. at 32. But this response is a *non sequitur*. It does not matter whether or not rebuttal to victim-impact evidence is presumptively admissible. As explained above (and as noted by the Missouri Supreme Court in its opinion), victim-character evidence is generally inadmissible. By holding that Gill's trial attorneys were ineffective for failing to discover and use at trial the pornography on the victim's computer—evidence that would have been offered solely to imply that the victim had an immoral character—the Missouri Supreme Court condemned counsel for failing to discover presump-

tively inadmissible character evidence, not the sort of victim-impact evidence that is typically admissible.

The conflict identified in the Petition arises from inconsistent holdings regarding whether it is objectively unreasonable for defense counsel to decline to investigate evidence that they do not believe will be admissible at trial. The Montana Supreme Court and the Tenth Circuit have both indicated that counsel is not required by the Sixth Amendment to expend resources unearthing inadmissible evidence. *See DeSchon v. State*, 197 P.3d 476 (Mont. 2008); *Cummings v. Sirmons*, 506 F.3d 1211 (10th Cir. 2007). In the present case, the Missouri Supreme Court reached the opposite conclusion. The Court should grant Petitioner's request for certiorari to resolve the conflict.

III. A purported "straightforward" application of *Rompilla v. Beard* does not support the Missouri Supreme Court's determination that Gill's trial attorneys were ineffective.

Gill argues that the Missouri Supreme Court's holding "involves nothing more than a straightforward application of *Rompilla v. Beard*, 545 U.S. 374 (2005)." Opp.Br. at 22. But, in fact, the decision in this case imposes a much heavier burden on counsel to investigate evidence pre-trial than did this Court's decision in *Rompilla*.

Most significantly, this Court did not hold in *Rompilla* that counsel is constitutionally obligated to investigate and obtain evidence that they reasonably believe will not be relevant or admissible at trial. To the contrary, this Court held that capital-defense

counsel was ineffective for failing to "make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla*, 545 U.S. at 377, 383-87. Gill argues that his trial attorneys were "experienced capital counsel" who "had to know the state would be presenting victim impact evidence." Opp.Br. at 24. But, again, Gill confuses victim-impact evidence, which counsel could reasonably predict would be admitted, with victim-character evidence which, for the reasons outlined above, counsel could reasonably expect would not be admitted over timely objection.

As Gill observes, the Court held in *Rompilla* that defense "[c]ounsel's obligation to rebut aggravating evidence extended beyond arguing that it ought to be kept out." 545 U.S. at 386 n.5. In *Rompilla*, counsel sought to exclude evidence in support of a statutory aggravating circumstance on the ground that admission of the evidence would be "prejudicial." *Id.* at 378, 386 n.5. Under those circumstances, counsel should have anticipated that her objection would be unsuccessful. Not so here. Missouri law does not contemplate that the character of the victim may be considered by the jury as an aggravating or mitigating factor in deciding whether to impose the death penalty. *See* Mo. Rev. Stat. § 565.032 (2000). Indeed, as noted *supra*, Missouri law holds that victim-character evidence is inadmissible in a murder trial and that any objection to it should be sustained. *See Gill*, 300 S.W.3d at 232. Thus, even if capital-defense counsel is generally obligated to prepare rebuttal to statutory aggravators, it is not unreasonable for counsel to decline to develop rebuttal to evidence that the law specifically identifies as inadmissible.

By insisting that counsel acted unreasonably in declining to investigate the murder victim's character before trial, Gill invites the courts to second-guess a fundamental strategic decision by capital-defense counsel—the decision to spend (or not spend) their limited resources pursuing a particular line of evidence. Justice O'Connor, writing in concurrence in *Rompilla*, observed that counsel's behavior in that case was unreasonable, in part, because "their decision not to obtain [the defendant's] prior conviction file was not the result of an informed tactical decision about how the lawyer's time would best be spent." 545 U.S. at 395 (O'Connor, J., concurring). Gill's attorneys, on the other hand, had legitimate strategic reasons not to spend their time looking at pornography on the victim's computer or interviewing Officer James about the computer's contents. Counsel knew that the State was not planning to use any material from the computer at trial. App. at A19-A20. And, as counsel explained, they were interested in spending their time dealing with the facts that incriminated Gill, not searching for evidence that might imply that the victim had a character flaw unrelated to the murder. App. at A19-A20. Similarly, their decision not to interview Officer James was a calculated choice not to expend resources on what they believed would be a fruitless endeavor:

> [Counsel David Kenyon]: [I]t didn't appear from reviewing the discovery that [Officer James] really did much other than tell which officers to do what . . . . Had we unlimited time and resources, sure, we would have wanted to interview everybody who was even remotely affiliated with this case, but you have to prioritize.

(PCR Tr. 149). Counsel's disinterest in whether pornography was on the victim's computer made sense in light of their experience that, when conducting the penalty phase in a jury trial, it is generally bad strategy to "slam a victim by showing bad things that the victim may have done." App. at A19. Neither Gill nor the Missouri Supreme Court's opinion explain why counsel could not reasonably decide before trial that they would not spend time seeking evidence to smear the victim during the penalty phase, but would instead rely on the trial court to keep all inadmissible victim-character evidence out.

Gill accuses Petitioner of "obfuscat[ing] the truth" and seeking to "mislead this Court" by omitting from the Petition a portion of counsel's testimony. Opp.Br. at 27-28. During the post-conviction hearing, one of Gill's trial attorneys testified that, had he known that the victim had so much pornography on his computer, he would have tried to use it as a "bargaining chip" to convince the State to limit its use of victim-character evidence. Opp.Br. at 28 (citing PCR Tr. 172-73). If the prosecutor persisted, counsel testified, he would have "strongly considered" using the pornography in rebuttal. *Id.*

Petitioner did not omit this testimony "in order to obfuscate the truth." The testimony was omitted because, like Gill's own analysis, it indulges in imagining what counsel would have done in hindsight, with the benefit of knowing that the State was able to introduce positive victim-character evidence despite counsel's objections. In *Rompilla*, this Court was careful to emphasize that "hindsight" must be "discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made." 545 U.S. at 381 (citing *Strickland*, 466 U.S.

at 689). By ignoring this fundamental requirement, the Missouri Supreme Court departed from the constitutional standard for evaluating the effectiveness of counsel enunciated in *Strickland* and reaffirmed in *Rompilla*. Certiorari is necessary to ensure that the performance of capital-defense counsel, in this case and those that follow, is evaluated according to the correct constitutional standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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